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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 362

STATE OF WISCONSIN EX REL. JOSEPH E. NIEDZIEJKO and ALFRED KACZKOWSKI, *Petitioners,*

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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CITATIONS

I. CASES:

A. Federal

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II. STATUTES:

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Wis. Stat. 954.025 ..... 1a

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BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dominic H. Frinzi, on behalf of Joseph E. Niedziejko and Alfred Kaczkowski, respectfully petitions this honorable Court for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Wisconsin, entered in the above entitled case on January 31, 1967, and reaffirmed on rehearing on April 14, 1967.

OPINIONS BELOW

Upon hearing before the Supreme Court of the State of Wisconsin, both cases were consolidated by order of said Supreme Court and treated as such thereafter.

The memorandum opinions of the Circuit Court of Milwaukee County, Wisconsin (Niedziejko R. 101-105 and Kaczkowski R. 101-103), are unreported and are printed in Appendix B hereto, *infra,* App. pp. 2a and 7a. The opinion of the Supreme Court of the State of Wisconsin printed in Appendix B hereto, *infra,* App. pp. 9a, is reported in 33 Wis. (2d) 488, R. 188-200, as to Niedziejko and R. 191-203 as to Kaczkowski. The opinion of the Supreme Court of the State of Wisconsin on rehearing printed in Appendix B hereto, *infra,* App. pp. 25a, is reported in 33 Wis. (2d) 488. (R. 203-204 as to Niedziejko and R. 206-207 as to Kaczkowski)

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on January 31, 1967. (Appendix B, *infra,* App. pp. 9a). (R. 187 as to Niedziejko and R. 190 as to Kaczkowski). A timely petition for rehearing was filed on March 1, 1967 (Appendix B, *infra,* App. pp. 24a, was denied on April 14, 1967. (Appendix B, *infra,* App. pp. 25a), (R. 202 as to Niedziejko and R. 205 as to Kaczkowski).

The jurisdiction of this honorable Court is invoked under 28 U.S.C. Section 1257 (3).

HOW FEDERAL QUESTION IS PRESENTED

The Federal Question was presented in the court of first instance by way of a Writ of Certiorari from the Circuit Court of Milwaukee County, Wisconsin to the

Board of Fire and Police Commissioners of the City of Milwaukee, Wisconsin. The denial of said petition in the court of first instance was appealed to the Supreme Court of the State of Wisconsin, which Court affirmed the order of the court of first instance. The order of the Supreme Court of the State of Wisconsin is the highest Court in that State, in which decision on that case could be had.

QUESTIONS PRESENTED

A. Were petitioners, police officers, denied their rights under the Fifth and Fourteenth Amendments of the United States Constitution, when they are compelled to answer inquiries as to their alleged misconduct, under pain of immediate discharge?

B. Where petitioners, police officers, are compelled to answer inquiries as to their alleged misconduct, under threat of immediate discharge, can such coerced statements be used as evidence to discharge petitioners?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statutes involved in this petition are: Wis. Stats. 885.24 and Wis. Stats. 954.025. These Statutes are set forth in Appendix A, *infra,* App. p. 1a. The Constitutional provisions involved are the Fifth and Fourteenth Amendments of the United States Constitution which state as follows:

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall even abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Petitioners Joseph E. Niedziejko and Alfred Kaczkowski, at all times hereinafter referred to, were police officers of the City of Milwaukee, Wisconsin. Superior officers of said department ordered them to appear before the Hon. John L. Coffey, Circuit Court Judge, acting as a magistrate in conducting a "John Doe" investigation pursuant to Section 954.025 of the Wisconsin Statutes. The petitioners were examined under oath in secret, without counsel being present. The magistrate shortly thereafter, advised the Chief of Police of the Milwaukee Police Department by letter that the petitioners were accused by unnamed individuals of accepting money from prostitutes.

Immediately thereafter the Chief of Police ordered the petitioners to appear at the Wisconsin State Crime Laboratory for the purposes of submitting to a polygraph examination. Said order stated, among other things, that failure to comply and answer all questions would result in the said petitioners' immediate discharge.

Petitioners did appear at the Wisconsin State Crime Laboratory and submitted to intensive questioning spanning several hours duration each. Admissions of accepting a bottle of whiskey were made by each petitioner during the said polygraph examination. Petitioners were cleared of any charges that the acceptance of a bottle of whiskey influenced the performance of their duties as police officers.

Subsequent to the polygraph examinations, the Chief of Police dismissed both petitioners and they thereupon appealed to the Board of Fire and Police Commissioners of the City of Milwaukee.

The hearings before the Board of Fire and Police Commissioners and the judgment of dismissal rendered by said Board was predicated upon the admissions made by petitioners during the polygraph examinations.

The petitioners appealed to the Supreme Court of the State of Wisconsin from the judgments of the Circuit Court for Milwaukee County. The Supreme Court of the State of Wisconsin affirmed the judgments of the Circuit Court for Milwaukee County.

REASONS FOR GRANTING THE WRIT

The decisions of this court in *Spevack* v. *Klein,* (1967) — U.S. —, 17 L. ed. 2d 574, and *Garrity* v. *New Jersey,* (1967) — U.S. —, 17 L. ed 2d 562, were

rendered between the time the Wisconsin Supreme Court issued its original decision and the time that the Petitioners brought a motion for rehearing. The Petitioners argued to the Wisconsin Supreme Court that the rationale in both of these decisions should be applied to the facts in this case.

However, the Wisconsin Supreme Court in its decision on the motions for rehearing indicated that the *Garrity* case, *supra,* did not apply because it concerned itself with the use of admissions in a criminal prosecution, and refused to apply the rule in the *Spevack* case, *supra,* because this court indicated in a footnote that "whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach."

The Petitioners believe that the court should determine the issues in the case for the purpose of clarifying the extent to which *Spevack, supra,* should be applied, and particularly should clarify the application in the case of a police officer who is threatened with discharge in a disciplinary proceeding.

It is the Petitioners' further belief that the Wisconsin Supreme Court erred in deciding that the *Garrity* case, *supra,* should not be applied to the case at bar in determining whether or not the statements given by the Petitioners were, indeed, coerced within the meaning of constitutional interpretation. The *Spevack* case, *supra,* clearly establishes that the protection afforded by the Fifth Amendment does not merely apply to situations where a fine or imprisonment may be imposed by rather to any sanction that may be "costly." It is the position of the Petitioners that the Wisconsin Supreme Court should have determined that the state-

ments given by the Petitioners were, indeed, coerced, under the rationale of the Garrity case and should have further determined that these statements could not be used against the Petitioners as determinations in a disciplinary proceeding. The Wisconsin Supreme Court should have further determined that under the Spevack decision the Petitioners had the unimpaired right to claim their privileges under the Fifth Amendment of the United States Constitution, with the accompanying freedom from coercion in attempts to circumvent their privilege.

CONCLUSION

For the foregoing reasons it is submitted that this petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The Statutes involved in this petition are: Wis. Stats. 885.24 and Wis Stats. 954.025 which state as follows:

885.24 *Actions for public moneys, immunity.*

No witness or party in an action brought upon the bond of a public officer, or in an action by the state or any municipality to recover public money received by or deposited with the defendant, or in any action, proceeding or examination, instituted by or in behalf of the state or any municipality, involving the official conduct of any officer thereof, shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, misdemeanor or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such action, proceeding or examination, except a prosecution for perjury committed in giving such testimony.

954.025 *John Doe proceeding*

If a person complains to a magistrate that he had reason to believe that a crime has been committed within his jurisdiction, the magistrate shall examine the complainant on oath and any witnesses produced by him and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the magistrate may proceed in such examination is within his discretion. The examination may be adjourned and may be secret. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. The record of such pro-

ceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.

APPENDIX B

Decisions on Writs of Certiorari

STATE OF WISCONSIN EX. REL. JOSEPH E. NIEDZIEJKO,
Petitioner,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE, *Respondent.*

HONORABLE LEO B. HANLEY
Circuit Judge, Presiding
Milwaukee, Wisconsin

November 19, 1965

Certiorari by the relator, Joseph E. Niedziejko, to review his discharge as a police officer in the Milwaukee police Department by the defendant, Board of Fire and Police Commissioners of the City of Milwaukee.

Joseph E. Niedziejko, the petitioner herein, was discharged from the Milwaukee Police Department by Chief of Police Howard O. Johnson. Petitioner appealed his discharge to the Fire and Police Commission of the City of Milwaukee. A formal hearing was had in which voluminous testimony was offered, and the Board found Niedziejko guilty of misconduct in respect to four counts established by the evidence and on December 5, 1963, sustained the petitioner's discharge.

Thereafter a review, pursuant to Chapter 586 of the Laws of 1911 as amended, was taken to the Circuit Court of Milwaukee County. The Court dismissed two of the four charges and modified the remaining two charges.

The Circuit Court remanded the record for a determination as to what penalty the Board would impose in view of the Circuit Court's dismissal of two of the charges and the modification of the remaining two charges.

The Board of Fire and Police Commissioners reaffirmed its original decision to dismiss Niedziejko for conduct unbecoming an officer in a written decision under date of March 17, 1964. The Crcuit Court affirmed the decision of the Board. A motion for rehearing was denied by the Circuit Court on June 15, 1964, and a judgment was entered on June 16, 1964, dismissing petitioner's appeal pursuant to Chapter 586 of the Laws of 1911 as amended.

The matter is now before this Court on certiorari to review petitioner's contention that his dismissal is unlawful in that it violated Chapter 586 of the Laws of 1911 as amended and violated the published rules and regulations of the Milwaukee Police Department.

In the case of *State ex rel. Ball* v. *McPhee,* 6 Wis. (2d) 190, the Supreme Court limited the reviewing court to the following determinations: (1) Whether the Board kept within its jurisdiction, (2) whether it acted according to law, (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that it might reasonably make the order or determination in question.

The Court is of the opinion that determinations (3) and (4) above mentioned were considered and decided on the appeal taken before another Branch of the Circuit Court. On that appeal the Circuit Court made a determination that the Board's action was not arbitrary, oppressive or unreasonable, and its action represented the judgment of the Board. That Court also determined that the evidence supported the determination in question.

The Court is satisfied that there was a judicial determination of the issues as to whether action of the Board

was arbitrary and whether the evidence supported the determination of the Board and it, therefore, is not necessary to consider those issues in this case.

The Court had read the entire record in this case and would be be of the opinion that the evidence supports the finding and that the Board did not act arbitrarily.

The Court is also of the opinion from an examination of the entire record that the Board of Fire and Police Commissioners acted within its jurisdiction and did not exceed it.

Petitioner contends the complaint containing the charges against him was in violation of Chapter 586 of the Laws of 1911 as amended, having not been timely filed.

The record discloses that the Chief of Police, Howard O. Johnson, on August 27, 1963, discharged the petitioner as a member of the Milwaukee police force and on that day reported his action to the Secretary of the Board of Fire and Police Commissioners. The report contained the specific reasons for petitioner's discharge.

The Court is of the opinion that the report of August 27, 1963, was in compliance with the provisions of Section 13, Chapter 586, Laws of 1911, as amended. This section provides in part as follows:

> "The chief discharging, or suspending for a period exceeding thirty days any member of his force shall immediately report the same to the secretary of the board of fire and police commissioners, together with a complaint setting forth the reason for such discharge or suspension and the name of the complainant if other than the chief."

The mere filing of a formal complaint (Document E) under date of September 5, 1963, for the purposes of the trial did not invalidate the report of August 27, 1963, con-

taining the reasons for the dismissal nor were petitioner's rights prejudiced by the service of a formal complaint.

Petitioner also contends that the Board denied a motion to make more definite and certain the five charges made against him, as provided and required by Rule 44, Section 11, of the Rules and Regulations of the Milwaukee Police Department.

This contention cannot be sustained because Rule 44, Section 11, pertains to trials before the Police Trial Board, a fact finding advisory board, and such rules are not applicable or binding on the Board of Fire and Police Commissioners.

Petitioner complains that he was denied the right to adverse examination of Chief of Police Howard O. Johnson as demanded in Document O.

Counsel for the petitioner cites no authority establishing the right of adverse examination of complaining witnesses before boards or commissions. The discovery statute contained in Chapter 326 of the Wisconsin Statutes relates to civil actions or proceedings.

Section 260.03 of the Wisconsin Statutes defines an action as follows:

> "An action is an ordinary court proceeding by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding."

Petitioner finally contends that the charges against him were made as a direct and proximate result of the arbitrary violation of the oath of secrecy by the John Doe magistrate.

The disclosure by the John Doe magistrate that witnesses gave sworn testimony that would implicate the petitioner

was not incompetent as a basis for the Chief of Police to commence proceedings before the Board of Fire and Police Commissioners or incompetent as having been illegally procured since the competency of evidence is not affected by the means of obtaining it unless procured by illegal search and seizure in violation of constitutional rights or by compulsion or duress. If the petitioner had testified before the John Doe magistrate under compulsion or duress and then the evidence was revealed to the Chief of Police we would have a different situation, since if the privilege of a witness is invaded the witness can raise the objection. The illegality of the release of material does not affect the collateral matter before the Board of Fire and Police Commissioners.

The petitioner was given a full and complete hearing and the Board made its determination of the charges on the basis of petitioner's own testimony and his own admission.

> "If on any reasonable view of the evidence, it will support the conclusion arrived at, the board had jurisdiction to decide as it did." *State ex rel. Dane County Title Co.* v. *Board* 2 Wis. (2d) 51, 63."

The Court being of the opinion that the Board kept within its jurisdiction and acted according to law, orders judgment affirming the order of the Board of Fire and Police Commisioners of the City of Milwaukee.

Dated at Milwaukee, Wisconsin, this 19th day of November, 1965.

By the Court,
/s/ Leo B. Hanley,
Circuit Judge.

STATE OF WISCONSIN EX rel. ALFRED KACZKOWSKI, *Petitioner*,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE, *Respondent*.

HONORABLE ROBERT M. CURLEY
Circuit Judge, Presiding
Milwaukee, Wisconsin

November 24, 1965

The petitioner, Alfred Kaczkowski, was discharged by the Chief of Police, Howard O. Johnson, and thereafter appealed said discharge to the Board of Fire and Police Commissioners of the City of Milwaukee.

On October 24, 1963, the Board sustained the petitioner's discharge. Thereafter a review was taken by the petitioner to the Circuit Court of Milwaukee County, Branch No. 3, the Hon. John A. Decker presiding, pursuant to Chapter 586 of the Laws of 1911. Judge Decker affirmed the discharge decision of the Board of Fire and Police Commissioners of the City of Milwaukee. This judgment was entered on June 2, 1964.

The within Writ of Certiorari was assigned to this branch of the Circuit Court of Milwaukee County. Thereafter the Board of Fire and Police Commissioners, through Assistant City Attorney, Mr. George Bowman, brought an order to show cause why an order should not be made quashing the Writ of Certiorari and petition for Writ of Certiorari hereinbefore allowed, on two grounds.

This matter was heard, and the court rendered and filed its memorandum decision dated November 10, 1964, wherein this court denied the defendant's motion to quash and granted the defendant twenty days within which to further plead. Both parties have filed briefs, and they have proven to be very helpful.

The Matter was argued before the court on June 21, 1965, and this court has now had ample opportunity, and has perused the briefs of the respective parties, examined the law as it applies to the within situation, and has gone over the extensive testimony taken at the hearing before the Board.

Counsel for the petitioner alleges many reasons why the proceedings had before the Board of Fire and Police Commissioners should be reversed, and among other pertinent citations has cited to the court the case of *State ex rel. Ball v. McPhee,* 6 Wis. (2d) 190, wherein the Wisconsin Supreme Court, in early 1959, laid down again the guidelines for reviewing the action of an administrative board or agency in Certiorari, and said that the court should go no further than to determine, (1) whether the board kept within its jurisdiction, (2) whether it acted according to law, (3) whether its action was arbitrary, oppressive, or unreasonable, and represented its will and not its judgment, and (4) whether the evidence was such that it might reasonably make the order or determination in question..

The court has carefully reviewed this and other citations and has come to the conclusion that points (3) and (4) have already been covered by the judicial review had before the Hon. John A. Decker, as provided for in Chapter 586 of the Laws of 1911, and that, therefore, the only two matters to be determined by this court are points (1) and (2); that is, whether the board kept within its jurisdiction and whether it acted according to law.

Among other things the petitioner has complained that the complaint was not filed timely; however, this court feels that this complaint was handled adequately in the decision by the Hon. John A. Decker on review.

Most of the alleged grievances cited in the petition for a Writ of Certiorari were, in fact, disposed of by

Judge Decker in his decision, and it would serve no purpose here to quote from Judge Decker's decision. There is ample credible evidence in the record, such as the petitioner's own admission of acceptance of money from a known prostitute, to affirm the Board of Fire and Police Commissioners.

The court finds no merit to the claim that the Board did not keep within its jurisdiction, nor that it did not act according to law, and orders judgment affirming the Board of Fire and Police Commissioners of the City of Milwaukee.

Dated: November 24, 1965

By the Court,
/s/ Robert M. Curley,
Circuit Judge

And aftewards, to-wit on the 31st day of January, A. D. 1967, the same being the 75th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

STATE EX rel. ALFRED KACZKOWSKI AND STATE EX. rel. JOSEPH E. NIEDZIEJKO, *Appellants,*

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE, *Respondent.*

Opinion by Justice Beilfuss

This cause came on to be heard on appeal from the judgment of the Circuit Court for Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court for Milwaukee County herein be, and the same is hereby, affirmed. (Justice Hanley took no part.)

Nos. 25 and 26

August Term, 1966

STATE OF WISCONSIN: IN SUPREME COURT

STATE EX REL. KACZKOWSKI, *Appellant*,

v.

FIRE AND POLICE COMMISSIONERS OF CITY OF MILWAUKEE, *Respondent*.

STATE EX REL. NIEDZIEJKO, *Appellant*,

v.

SAME, *Respondent*.

APPEALS from judgments of the circuit court for Milwaukee county: ROBERT M. CURLEY and LEO B. HANLEY, Circuit Judges. *Affirmed*.

These appeals are in certiorari proceedings to the Board of Fire and Police Commissioners of the city of Milwaukee. Although these appeals are from separate judgments of separate branches of the circuit court, the parties agree that the issues raised in each are identical and consequently they will be treated as one case by this court.

In 1963, Alfred Kaczkowski and Joseph Niedziejko were police officers with the rank of detective with the Milwaukee police department. On June 19, 1963, each petitioner was suspended by Milwaukee Police Chief Howard O. Johnson for five alleged counts of violations of police department rules. The violations principally concerned accepting money from a known prostitute. A police department board of inquiry met, found Kaczkowski guilty on all five charges and Niedziejko guilty on three charges, and recommended discharge. On August 27, 1963, Chief Johnson ordered both petitioners discharged. The petitioners appealed to the Board of Fire and Police Commissioners pursuant to ch. 586, Laws of 1911. Upon the petitioners' appeals the chief filed formal charges with the board. Each petitioner had a

separate and extensive trial before the board, that of Kaczkowski running for six days and that of Niedziejko for nine days. The transcript in each case is over 700 pages. Upon conclusion of each trial the board filed written decisions and findings of fact. Each petitioner was found guilty of violations of Police Department Rule 44, sec. 8 (conduct unbecoming a member and detrimental to the service), and Rule 24, sec. 28 (untruthfulness). Charges of violations of Rule 29, sec. 9 (failing to obey a lawful order of a superior officer) against each petitioner were dismissed. Thus the chief's orders for discharge were sustained by the board.

The petitioners brought separate actions for review in the circuit court for Milwaukee county pursuant to sec. 1, sub. 20, ch. 586, Laws of 1911. After appropriate proceedings the orders of the board were sustained by the circuit court. In the case of Kaczkowski, Milwaukee Circuit Judge DECKER signed the order for judgment affirming the board's order on January 24, 1964. In the case of Niedziejko, Judge LANDRY signed a similar order for judgment on June 15, 1964; this order was based on an oral decision announced by Judge LANDRY on March 18, 1964. The petitioners' motions for a rehearing or a new trial in the interests of justice were denied.

In all of the proceedings outlined above the procedure prescribed by the legislature in ch. 586, Laws of 1911, was followed precisely. The trials before the Board of Fire and Police Commissioners were presided over by the Honorable FRANCIS X. SWIETLIK, a former circuit judge from Milwaukee county and Dean of Marquette University Law School; the rules of evidence were strictly enforced by Judge SWIETLIK. The decisions on review of the board's orders were arrived at after a conference of Circuit Judges DECKER, LANDRY, and RASKIN, although Judge DECKER and Judge LANDRY took individual responsibility for their respective orders and opinions.

On June 15, 1964, the petitioners petitioned for writs of certiorari in separate branches of the circuit court for Mil-

waukee county. The Kaczkowski case was before Judge CURLEY and the Niedziejko case before Judge HANLEY. The board moved to quash the writs, which motions were denied by both courts. Judge CURLEY and Judge HANLEY entered judgments affirming the judgments of discharge and dismissing the petitioners' appeals on the merits. From those judgments the petitioners have appealed.

For the appellants there were briefs and oral argument by *Louis J. Ceci* of Milwaukee.

For the respondent there were briefs by *John J. Fleming,* city attorney, and *George A. Bowman, Jr.,* assistant city attorney, and oral argument by *Mr. Bowman.*

BEILFUSS, J. Subsequent to filing of the notice of appeal the respondent, Board of Fire and Police Commissioners, filed a motion to dismiss these appeals upon two grounds—(1) that the supreme court is without jurisdiction to hear the appeal, and (2) that the petition for writ of certiorari contains no issues of law to be decided. Although the motion to dismiss the appeals was denied, we deem it advisable to re-examine the question of jurisdiction.

By means of ch. 586, Laws of 1911 (part of ch. 29, Milwaukee city charter), the legislature provided for the duties and powers of the Board of Fire and Police Commissioners in cities of the first class. This chapter has remained in force substantially unchanged since passage. Pertinent to these cases is sec. 1, subs. 20, 21, 22, and 23, which provide:

"20. Any officer or member of either department discharged, suspended, or reduced, may within ten days after the decision and findings hereinbefore provided for are filed with the secretary of said board, bring an action in the circuit court of the county in which said city is located to review said order; said action shall be begun by the serving of a notice on the secretary of said board making such order and the city attorney of such city, which notice may be in the following or similar form:

"...

"21. Upon the service of said demand the board upon whom said service was made shall within five days thereafter certify to the clerk of the circuit court of said county all charges, testimony, and everything relative to the trial and discharge, suspension, or reduction in rank of said member. Upon the filing of said return with the clerk of said court, said actions for review shall be deemed at issue and shall have precedence over any other cause of a different nature pending in said court, and said court shall be considered always open for the trial thereof, and upon the application of the discharged member or the board, the court shall fix a date for the trial thereof which shall not be later than fifteen days from and after the date of such application except upon agreement between the board and such discharged or suspended member. Such action shall be tried by the court without a jury and shall be tried upon the return made by said board. In determining the question of fact presented, the court shall be limited in the review thereof to the question: 'Under the evidence was the decision of the board reasonable?' The court shall have the right to require further and additional return to be made by the board of fire and police commissioners, and may also require such board to take further and additional testimony and make return thereof.

"22. No costs shall be allowed in said action to either party and the clerks' fees shall be paid by the city in which said department is located. If the decision of such board is reversed, the discharged or suspended member shall forthwith be reinstated in his former position in the said department and shall be entitled to his pay the same as if he had not been discharged or suspended. If the decision of the board is sustained the order of discharge, suspension, or reduction shall be final and conclusive in all cases.

"23. The chief engineer of the fire department and the chief of police of said cities, shall be the head of their re-

spective departments and shall have power to regulate said departments and prescribe rules for the government of its members. The chief of police shall cause the public peace to be preserved and see that all laws and ordinances of the city are enforced. He shall be responsible for the efficiency and general good conduct of the department under his control. Each of said chiefs shall have the custody and control of all public property pertaining to said departments and everything connected therewith and belonging thereto. They shall have the custody and control of all books, records, machines, tools, implements, and apparatus of every kind whatsoever necessary for use in each of said departments."

The petitioners contend that certiorari should lie to upset the action of the Board of Fire and Police Commissioners upon the following grounds:

(1) The board did not act according to law in permitting the use of testimony obtained under threat of discharge and testimony obtained during a polygraph examination.

(2) Records or testimony of a secret John Doe investigation were revealed contrary to sec. 954.025, Stats.

(3) Persons other than the district attorney in a criminal prosecution used the records and testimony taken in a secret John Doe investigation.

Even if the petitioners' three main contentions find basis in the record, there is a serious question of the jurisdiction of the courts to further review the petitioners' discharge by way of certiorari. In ch. 586, Laws of 1911, the legislature provided an expeditious method of review of discharge orders by the Milwaukee Board of Fire and Police Commissioners. Sec. 1, sub. 22 of that chapter provides for the finality of the circuit court review of a discharge order:

"... If the decision of the board is sustained the order of discharge, suspension, or reduction *shall be final and conclusive in all cases.*" (Emphasis supplied.)

In *Clancy* v. *Fire and Police Commissioners* (1912), 150 Wis. 630, 138 N.W. 109, the appellants contended that they had a right to appeal from the judgment of the circuit court reviewing the board's order in a discharge case. The appellants were confronted with a motion to dismiss, and, while contesting that motion, moved this court for issuance of a writ of certiorari directed to the circuit court for the purpose of reviewing the judgment. This court dismissed the appeal and denied the motion for issuance of certiorari on the ground that the legislative intent of ch. 586 was that the proceeding should be finally closed with the decision of the circuit court. In so deciding the court held that the review procedure provided by the legislature was intended to perform the function of a writ of certiorari where the writ is directed to review the action of a tribunal of this nature. Therefore certiorari would not lie because the review procedure provided in ch. 586 is exclusive and conclusive. At page 634 the court stated:

"Subsec. 22 provides that if the decision of the board is reversed by the court the discharged man shall be *at once reinstated* in his position and entitled to his pay as if never discharged, and that if the decision of the board be sustained the order of discharge shall be *final and conclusive* in all cases.

"The purpose to absolutely terminate the proceeding with the decision of the circuit court seems here very certain.

"Doubtless the probable demoralizing effect on the public service of long-drawn-out proceedings, during which time no permanent appointment could be made, was fully appreciated. Every clause of the law indicates the intention to make the entire proceeding as speedy as possible and yet give the accused person the right to fully make his defense, and in view of the very significant provisions of the section last cited we entertain no doubt that the statute means, and was intended to mean, that the proceeding should be finally closed by the decision of the circuit court. It follows that the appeal will be dismissed."

The court further states, at pages 636, 637:

"In substance this appeal was intended to perform the functions of a writ of *certiorari* in a case where the writ is directed to a tribunal of this nature, namely, to review the evidence to ascertain only whether there was reasonable ground for the decision made. *State ex rel. N. C. Foster L. Co.* v. *Williams,* 123 Wis. 61, 100 N.W. 1048. It is a method provided by statute by which the power of superintending control which is vested in the circuit courts by the constitution is to be exercised.

"The constitution (art. VII, sec. 8) provides that the circuit courts shall have a supervisory control over all inferior courts and tribunals and shall have power 'to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari, and all other writs* necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions.'

"While no formal writ issues in the present case and the proceeding is termed an appeal, it accomplishes the same result as though it had been commenced by the issuance of the ancient writ, and there can be no doubt of the legislative power to reach the desired end by procedure termed an appeal as well as by an original common-law writ. It is true that by the last clause of subsec. 21 it is provided that the court may require the board to make a further return and also 'to take further and additional testimony and make return thereof.' The appellants claim that this clause authorizes the circuit court to try and decide the case on testimony which has never been considered by the board, and thus that in such cases the court is authorized to pass *de novo* upon the question as to whether the accused is guilty or not.

"We do not so construe the clause in question. . . ."

The *Clancy Case* is cited and followed in *Jendrzejewski v. Fire and Police Commissioners* (1950), 257 Wis. 536, 44

N.W. (2d) 270. In *Jendrzejewski* the matter did not come to the court by certiorari but by an appeal from an order of the circuit court. However, the court did state at pages 538, 539:

"... In the *Clancy Case* the court construed the statute to mean that the commissioners had no right to appeal and that the proceedings terminated with the decision of the circuit court. ...

"... The provisions of ch. 586, Laws of 1911, and of sec. 62.13 (5) (h), Stats., relating to appeals are identical in substance and provide only for a limited review of the disciplinary orders of boards of fire and police commissioners. A complete review, such as is provided from the determinations of most tribunals, boards, and commissions, is not provided for. Every provision of the law indicates a legislative intent to make the entire proceeding as speedy as possible, and that the order of the circuit court upon the reasonableness of the determination of the commissioners be final and conclusive."

While *Clancy* specifically and *Jendrzejewski* inferentially hold that certiorari is not available to review the actions of a fire and police commission in this court, two cases involving the demotion of a police captain by the fire and police commission of the city of Janesville indicate that certiorari is a proper remedy to review the action of the board upon the ground that it acted without authority of law or committed other jurisdictional error. These cases are: *Petition of Heffernan* (1943), 244 Wis. 104, 11 N.W. (2d) 680; and *State ex rel. Heffernan* v. *Board* (1945), 247 Wis. 77, 18 N.W. (2d) 461.

In *Petition of Heffernan, supra,* the police officer made an application to this court for leave to commence an original action for a writ of mandamus to compel the circuit court to consider and decide questions of jurisdictional error raised by the petitioner on his appeal to the circuit court under sec. 62.13 (5) (h), Stats. 1941, from an order of the

fire and police commission. Sec. 62.13 (5) (h) was substantially similar to sec. 1, subs. 20, 21 and 22, ch. 586, Laws of 1911, except that it ends with the words "final and conclusive" rather than "final and conclusive in all cases." The Court held that the only issue to be determined by the circuit court was whether upon the evidence the order of the board was reasonable and denied the application for the writ of mandamus.

The court, however, went on to advise that certiorari was available as an exercise of the superintending control over inferior courts and "jurisdictions" vested in the circuit court by sec. 8, art. VII, Const. At page 108 in *Petition of Heffernan, supra,* it is stated:

"... However, even though there is no such express provision in a statute authorizing an appeal for the judicial review of such an order on other grounds, and even if in such statute it is expressly provided that the appeal thereby authorized shall be the exclusive remedy for a party aggrieved by the order, such party may be granted relief on the grounds that the board acted without authority of law or committed other jurisdictional error rendering its proceedings void when those matters are duly presented to a court of competent jurisdiction in a proceeding which is proper for that purpose. *Lamasco Realty Co.* v. *Milwaukee,* 242 Wis. 357, 394-396, 8 N.W. (2d) 372, 8 N.W. (2d) 865."

Petition of Heffernan, supra, finds support for this statement in *Lamasco Realty Co.* v. *Milwaukee* (1943), 242 Wis. 357, 8 N.W. (2d) 372, 8 N.W. (2d) 865, and in *Borgnis* v. *Falk Co.* (1911), 147 Wis. 327, 133 N.W. 209, the court states at page 359:

"... the decision of such a board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review; it cannot itself conclusively settle that question and thus endow itself with

power. If no appeal from its conclusions be provided, the question whether it has acted within or exceeded its jurisdiction is always open to the examination and decision of the proper court by writ of *certiorari*. . . ."

The *Lamasco Case, supra,* at pages 394-396, is authority for the proposition that where the scope of an exclusive statutory review of the action of a board or commission is limited, the courts may entertain questions of jurisdiction which could not be raised by way of the exclusive statutory review.

Taken together, *Heffernan, Lamasco* and *Borgnis* stand for the principle that:

Where the legislature provides for a final and conclusive judicial review of the action of a board, commission or other nonjudicial body, the courts have jurisdiction to review by certiorari only those strictly legal questions which were not or could not have been raised by way of the judicial review proceeding provided by the legislature.

State ex rel. Ball v. *McPhee* (1959), 6 Wis. (2d) 190, 199, 94 N.W. (2d) 711, dealt with the scope of review in certiorari from an order of the Wisconsin Board of Regents of State Colleges discharging a teacher. The statute in question (sec. 37.3 (1)) provided that the "action and decision of the board in the matter shall be final." The court held that the action of the board was subject to review by *certiorari* and that the review was limited to the following:

"'. . . (1) Whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of the law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.'"[1]

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[1] Also see *State ex rel. Wasilewski* v. *Board of School Directors* (1961), 14 Wis. (2d) 243, 111 N. W. (2d) 198; and *State ex rel. Gudlin* v. *Civil Service Comm.* (1965), 27 Wis. (2d) 77, 133 N. W. (2d) 799.

The *Ball Case,* and the *Wasilewski* and *Gudlin Cases* cited in footnote 1 all stand for the rule that where there are no stautory provisions for judicial review the action of a board or commission may be reviewed by way of *certiorari.*

Whether alleged error by a nonjudicial body is "jurisdictional" or "not according to law" so that it may be reviewed by "certiorari" depends in part on whether the error could be challenged by way of an exclusive review procedure provided by the legislature.

As set forth above, sec. 1, subs. 20, 21, 22 and 23, ch. 586, Laws of 1911 does provide for judicial review to the circuit court. However, "the court shall be limited in the review thereof to the question: 'Under the evidence was the decision of the board reasonable?' "

The last two enumerated criteria for review in certiorari set forth in the *Ball Case, supra,* namely, "whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment;" and "whether the evidence was such that it might reasonably make the order or determination in question" are encompassed by the standard of judicial review provided in ch. 586, Laws of 1911, namely, "Under the evidence was the decision of the board reasonable?" As to these two elements judicial review has been provided and they should not be subjected to a double review by means of certiorari.

The first two elements of review in certiorari as set forth in *Ball,* namely, "whether the board kept within its jurisdiction" and "whether it proceeded on correct theory of the law" are not necessarily encompassed within the standard "Under the evidence was the decision of the board reasonable?" The legislature, then, did not provide judicial review for these two elements. Conceivably a board could act beyond its jurisdiction and it could proceed upon an incorrect theory of the law. In those instances judicial review should be available by means of a writ of certiorari.

We hold, therefore, that certiorari is available to review orders of the board of fire and police commissions under ch. 586, Laws of 1911,[2] when it is alleged that the board acted beyond its jurisdiction or that it proceeded upon an incorrect theory of the law.

The question remains, does the petitioner allege that the board did not keep within its jurisdiction or that the board did not act according to law?

In both cases the petitioners state the issues to be:

"I. Did the Board of Fire and Police Commissioners of the City of Milwaukee act according to law in permitting the introduction of testimony obtained by coercion under threat of discharge and during a polygraph examination?

"II. Is the revelation of the records or testimony, or a summary thereof, in a secret John Doe proceeding contrary to Section 954.025, Wis. Stats., and therefore unlawful?

"III. Can the records of and testimony taken in a secret John Doe proceeding be used by anyone except the District Attorney in a criminal proceeding?"

The petitioners' contentions do not allege that the board acted beyond its jurisdiction but do allege that it did not act according to law.

An examination of the lengthy records in both cases does not sustain any of the contentions made by the petitioners.

Both officers were ordered by the chief of police to submit to a polygraph examination and threatened with discharge if they failed to do so. Both officers presented themselves for the polygraph examination. Before the polygraph examination, the interrogator, Mr. Joseph Wilimovsky, Jr., assistant superintendent of the Wisconsin State Crime Laboratory, conducted a preexamination interview. The peti-

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[2] This Rule will apply with equal force to all police and fire departments. See sec. 62.13 (12), Stats., and appeal of *Jendrzejewski* (1950), 257 Wis. 536, 44 N. W. (2d) 270.

tioners were interviewed in the presence of their two attorneys, Mr. Ceci and Mr. Fritschler, and given an opportunity to and did consult privately with these attorneys. They were also advised that regardless of the order of the chief of police they could consult with the attorneys relative to the examination. At the hearing before the board, Mr. Wilimovsky was permitted, over objection, to testify as to admissions against interest made by the petitioners; he was not permitted to testify to or give his opinion as to the results of the polygraph examination. The admissions were properly received by the board—this was not contrary to law.

Petitioners' contention that records of a secret statutory John Doe investigation were revealed contrary to sec. 954.025, Stats., likewise has no merit. The record reveals that it was the petitioners, through their attorneys, who demanded and subpoenaed records of the John Doe investigation as a part of or to be used in their defense. This was done over the objection of counsel for the board. It is basic that a litigant cannot claim prejudicial error when the board granted his own request to obtain documents he claimed were necessary for his defense even though the John Doe magistrate might have violated sec. 954.025, Stats., in releasing them.

The petitioners' final contention is that persons other than the district attorney used the records and testimony taken in a secret John Doe investigation contrary to sec. 954.025.

In *State ex rel. Niedziejko* v. *Coffey* (1964), 22 Wis. (2d) 392, 126 N.W. (2d) 96, a petition for writ of prohibition brought by these same two petitioners, it was held that a magistrate in a John Doe hearing declared to be a secret hearing was prohibited from revealing the record, the testimony, or summary thereof to any person other than the district attorney, except as it was used in a preliminary hearing or a trial in a criminal action. It appears that in June, 1963, the magistrate did advise the chief of police by letter that witnesses had testified that both petitioners had ac-

cepted cash from individuals engaged in the field of prostitution and that both petitioners refused to testify upon the ground of self-incrimination. The *Niedziejko* v. *Coffey Case, supra,* decided in 1964, did not reach back to June, 1963. The opinion states at page 402:

"It appears from the record that some of the threatened acts were in fact performed prior to the date that petitioners applied for the writs. The trial court was correct in stating that prohibition will not lie against those acts."

The petitioners argue that the investigation by the chief of police and police board was initiated by the communication from the John Doe magistrate and that the "tainted fruit" doctrine then permeated the whole investigation. This argument would require us to assume that the conduct of these officers would not have otherwise come to the attention of the chief of police. This we cannot do; in certiorari we review only the record before us. The record before the board reveals ample credible and admissible evidence from independent sources, including the testimony of the petitioners themselves to the effect that they did accept cash and liquor from a person they knew to be known as one engaged in prostitution.

The Board of Fire and Police Commissioners did act according to law in conducting the hearing and in reaching their findings.

Although we hold that errors of jurisdiction and errors of law by a fire and police commission can be reviewed by a writ of certiorari, we wish to point out that this remedy should be used sparingly and only when those errors clearly appear.

For the reasons enunciated in the *Clancy* and *Jendrzejewski Cases* cited above, the legislature intended that judicial review should be limited and prompt. The instant cases are an illustration of a frustration of that purpose. The petitioners' status as police officers has been in doubt and

in litigation since August of 1963, a period of approximately three and one-half years. The hearing before the fire and police commission was conducted, in the main, by Judge SWIETLIK, a former circuit judge and law school dean and presently an evidence professor. The record reveals that rules of evidence were scrupulously observed, a standard not required in most board hearings, and that petitioners were afforded all of the "fair-play" safeguards. The statutory appeals were heard by three able and experienced judges who thoroughly explored and considered the board's record. The records were again reviewed by able trial judges upon a motion for rehearing in these certiorari proceedings. All were of the opinion that the petitioners were afforded a fair hearing and that the evidence amply sustained a finding of misconduct which warranted discharge. We agree completely.

By the Court.—Judgments affirmed.

HANLEY, J., took no part.

And afterwards, to-wit on the 11th day of April, A. D. 1967, the same being the 98th day of said term, the following proceedings were had in said cause in this Court:

STATE EX REL. JOSEPH E. NIEDZIEJKO,
STATE EX REL. ALFRED KACZKOWSKI,
Appellants,

v.

BOARD OF FIRE & POLICE COMMRS. OF THE CITY OF MILWAUKEE,
Respondent.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in said cause, it is now here ordered that said motion be, and the same is hereby, denied without costs. Opinion to be filed.

Nos. 25, 26

AUGUST TERM, 1966

STATE OF WISCONSIN: IN SUPREME COURT

STATE EX REL. ALFRED KACZKOWSKI,
Appellant,

v.

BOARD OF FIRE & POLICE COMMRS. OF THE CITY OF MILWAUKEE,
Respondent.

STATE EX REL. JOSEPH E. NIEDZIEJKO,
Appellant,

v.

BOARD OF FIRE & POLICE COMMRS. OF THE CITY OF MILWAUKEE,
Respondent.

PER CURIAM (on motion for rehearing.) Petitioners, in their briefs in support of their motion for rehearing, contend that the admission into evidence at the hearing before the board of admissions made by them at the State Crime Laboratory interview preceding the taking of the polygraph tests violated their constitutional rights. This contention is grounded on the assertion that their admissions were induced by the threat of the chief of police that they would be discharged if they failed to answer Mr. Wilimovsky's questions.

Our review of the record negates this assertion. The police chief's threat was limited to the taking of the polygraph examination and did not encompass the pre-examination interview. Not only did this interview take place in the presence of petitioners' attorneys, Ceci and

Fritschler, and after consultation with them, but Wilimovsky specifically informed them of their constitutional right not to answer the questions to be propounded. We find that petitioners clearly understood that it was voluntary on their part whether or not they participated in the preexamination interview. In other words petitioners had the free choice of either taking the polygraph examination with or without this preexamination interview and they chose the former.

Petitioners place reliance upon the two recent cases of *Garrity* v. *New Jersey* (1967), 385 U. S. 493, 87 Sup. Ct. 616, 17 L. Ed. (2d) 562, and *Spevack* v. *Klein* (1967), 385 U. S. 511, 87 Sup. Ct. 625, 16 L. Ed. (2d) 574. We deem neither to be controlling here. *Garrity* is concerned with the use of admissions *in a criminal prosecution* which were induced by threat of discharge. *Spevack* held that the failure of a lawyer to produce certain of his records pursuant to a *subpoena duces tecum* could not be the basis of disbarment because he had the right to refuse to produce the records on the ground that they might incriminate him. Significantly, footnote 3, page 5, of the *Spevack* opinion states:

> "Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach."

The motion for rehearing is denied without costs.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 21 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 362

STATE OF WISCONSIN EX REL. JOSEPH E. NIEDZIEJKO and ALFRED KACZKOWSKI,
Petitioners,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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CITATIONS

Cases:

A. Federal

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.

STATE OF WISCONSIN EX REL. JOSEPH E. NIEDZIEJKO and ALFRED KACZKOWSKI,
Petitioners,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OF FACTS

Petitioners Joseph E. Niedziejko and Alfred Kaczkowski, were police officers of the City of Milwaukee. As a result of a John Doe investigation of alleged criminal misconduct within the police department, the John Doe magistrate informed the Milwaukee Chief of Police that the petitioners had been accused of accepting money from prostitutes. The Chief of Police directed the petitioners to appear at the Wisconsin State Crime Lab-

oratory for the purpose of submitting to a polygraph examination. Such examination was conducted by Mr. Joseph C. Wilimovsky, Jr., Assistant Superintendent of the State Crime Laboratory.

Prior to conducting polygraph examinations pre-examination interviews took place in the presence of petitioners and their legal counsel, Mr. Ceci and Mr. Frischler. Petitioners were informed of their constitutional rights and told to feel free to consult with their attorneys in private at any time.

Subsequent thereto petitioners were discharged by the Milwaukee Chief of Police and appealed such discharge to the Board of Fire and Police Commissioners. Each was given a full trial before said Board and the discharges were sustained.

The action of the Board of Fire and Police Commissioners was appealed to the Circuit Court of Milwaukee County, thereafter to the Supreme Court of the State of Wisconsin and discharges were sustained.

Petitioners moved for rehearing before the Supreme Court of Wisconsin contending that the admission into evidence at the hearing before the Board of Fire and Police Commissioners of admissions made by them at the State Crime Laboratory interview preceding the taking of the polygraph tests violated their constitutional rights. The Supreme Court of the State of Wisconsin rejected this contention. The results of the polygraph tests were not admitted into evidence.

QUESTIONS PRESENTED

1. Does the petitioners' petition for Writ of Certiorari raise any substantial Federal question as to whether they were denied their rights under the Fifth and Fourteenth Amendments to the United States Constitution in that:

a) were the statements of the petitioners voluntarily made?

The Supreme Court of the State of Wisconsin answered this question "Yes."

and

b) if the statements had been made involuntarily, does their use in a civil discharge hearing of a police officer violate constitutional rights granted under the Fifth and Fourteenth Amendments to the United States Constitution?

The Supreme Court of the State of Wisconsin answered this question "No."

ARGUMENT

I.

The statements of the petitioners were voluntarily made and no substantial Federal question is raised.

Nowhere in any decision of the Court has there ever been a ruling that a voluntary statement or admission cannot be used in a trial or proceeding. Obviously when a statement is voluntary, its use cannot be considered a violation of any constitutional right of the maker of the statement.

The Supreme Court of the United States, repeatedly over the years, has accepted the factual findings of the state courts and has refused to substitute its judgment, except where there has been a palpable evasion of constitutional guarantees.

Mr. Justice Frankfurter in *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 85 L.E. 836, at page 294, stated as follows:

> " * * * It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. * * * "

This decision has been repeatedly cited with authority by the Court and was, in effect, reiterated by Justice Reed in delivering the opinion of the court in *Pennekamp v. Florida,* 328 U.S. 331, 90 L.E. 1295, wherein he said, at page 345:

> " * * * While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights."

The Supreme Court of the State of Wisconsin in rejecting the motion for rehearing of the petitioner clearly and concisely found petitioners' statements to have been voluntary. The court found that the police chief's threat

as to disciplinary action was limited to the taking of the polygraph examination and did not encompass the pre-examination interview. That the interview took place in the presence of petitioners' attorneys and that they were specifically informed by Mr. Wilimovsky of their constitutional right not to answer questions to be purported. The court found that the petitioners had the free choice of taking the polygraph examination with or without the pre-examination interview and they chose the former.

This finding of the court is set forth fully in its decision in petitioners' Appendix, pages 25a and 26a.

While the respondent does not wish to go into detail as to the voluminous testimony in the trials of the two petitioners before the Board of Fire and Police Commissioners, we have nevertheless included within the appendix to respondent's brief, pages 10-12, excerpts of pertinent testimony of Mr. Wilimovsky substantially supporting the findings of the Supreme Court of the State of Wisconsin that the statements of the petitioners were voluntary.

II.

Even if involuntary statements of a police officer were used in a civil discharge hearing, such use does not raise any substantial Federal question under the Fifth and Fourteenth Amendments to the United States Constitution.

The petitioners, in support of their contention that the use of involuntary or coerced statements of a police officer

in a civil discharge hearing is a violation of their constitutional rights, cited the cases of:

> *Garrity v. New Jersey* (1967) — U.S. —, 17 L. ed. (2d) 562.
>
> *Spevack v. Klein* (1967) — U.S. —, 17 L. ed. (2d) 574.

The *Garrity Case, supra,* applies only to the use of involuntary or coerced statements of a police officer in a criminal action. It does not in any way apply to the forfeiture of a public office. In the *Garrity Case* the court stated at page 565 as follows:

> "We agree with the New Jersey Supreme Court that the forfeiture of office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict appellants in their criminal prosecutions."

At page 566 the court quoted with authority *McAuliffe v. New Bedford,* 155 Mass. 216, 29 N.E. 517, and clearly set forth the issue in the *Garrity Case,* as follows:

> "Mr. Justice Holmes in McAuliffe v. New Bedford, 155 Mass 216, 29 NE 517, stated a dictum on which New Jersey heavily relies:
>
> > " 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.' Id., at 220, 29 NE, at 517-518.

> "The question in this case, however, is not cognizable in those terms. Our question is whether the Government, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee."

In its decision in the *Garrity case,* the court held at page 567:

> " * * * We now hold the protection of the individual under the Fourteenth Amendment against coerced confessions prohibits use in subsequent *criminal proceedings* of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." (Italics ours)

The *Spevack Case, supra,* involved the disbarment of an attorney for refusing to produce documents by reason of the Fifth and Fourteenth Amendments. In the majority decision delivered by Mr. Justice Douglas and concurred in by the Chief Justice, Mr. Justice Black and Mr. Justice Brennan, the court said at page 578, footnote 3:

> "3. Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach."

Mr. Justice Fortas in his concurring opinion clearly distinguished between a lawyer's right to remain silent and a public employe who was asked questions relative to his official duties, stating at page 580 as follows:

> "I agree that Cohen v. Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954 (1961), should be overruled. But I would distinguish between a lawyer's

right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding. Garrity v New Jersey, — US —, 17 L ed 2d 562, 87 S Ct —."

Clearly, a policeman is not a second-class citizen and has every right to invoke the protection of the Fifth and Fourteenth Amendments in a criminal action brought against him. It is an entirely different question, however, when an attempt is made to shield misconduct as a public employe in the public service by trying to invoke such constitutional rights. This court in interpreting the Fifth Amendment has repeatedly not only considered the history and purpose of the privilege but has equally also considered the urgency of other public interests. Nothing could be more effective in destroying the confidence of the citizens of this country in law enforcement than to permit a law enforcement officer to refuse to answer questions which bear directly upon his honesty and moral fitness to act as a public officer.

Every officer who takes a position of public trust takes it knowing full well that his conduct in office is subject to constant public scrutiny and should not be allowed to claim a constitutional immunity from answering to the public for his acts in his official capacity.

CONCLUSION

Petitioners have failed to raise a substantial Federal question under the Constitution of the United States for the foregoing reasons, and it is respectfully requested that this petition for Writ of Certiorari to the Supreme Court of Wisconsin be denied.

Respectfully submitted,

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APPENDIX A

Excerpts from transcript of testimony in Hearing on Appeal of Dismissal before the Board of Fire and Police Commissioners relative to Alfred Kaczkowski as follows:

Direct Examination of Joseph Wilimovsky, Jr.

Page of Transcript

92 "Q. Did Alfred Kaczkowski appear before you?
"A. Yes, sir, he did.

"Q. With whom did he appear?
"A. He was represented by Mr. Ceci and co-counsel, Mr. Frischler, an attorney of Madison, Wisconsin.

93 "Q. Now during that period what time did they appear before you?
"A. Well, Mr. Kaczkowski and another subject, who was scheduled first, arrived at approximately nine thirty a.m. I did not have an opportunity to commence the sceduled appointment for Mr. Kaczkowski until three ten p.m.

"Q. I see. Did you have a conversation with Mr. Kaczkowski in the presence of his counsel?
"A. Yes, sir.

"Q. Relative to taking this test?
"A. Yes, sir, I did.

"Q. Was there a preliminary conference?
"A. Yes, sir, with counsel first.

"Q. All right, would you describe what occurred during that conference."

* * * *

95 "Q. Did you question Mr. Kaczkowski prior to giving him the polygraph test?
"A. Yes, I did."

* * * *

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97 "Q. This you understand, Mr. Wilimovsky, is directed to the conversation which took place prior to the
98 giving of the polygraph test, you understand?

"A. I fully understand.

"Q. All right, continue.

"A. Introduced to Mr. Alfred Kaczkowski, as I say, at approximately threa ten when he entered the interview room; present was Mr. Ceci, Mr. Frischler, and Chief of Police Johnson's representative, Lieutenant Howard Ritzman. I then confronted Mr. Kaczkowski with the reputations and allegations of his accused, Mrs. Johnnie Mae Louise Jackson, and on the basis of the generalities that I could direct, plus one or two specific points,—I might add also that Mr. Kaczkowski was advised by me that even contrary to the fact that he was directed to make himself available for examination, I had advised him on numerous occasions of his constitutional privilege as an American citizen, and that at any time that he wanted to consult with his counsel to feel free to step up and leave the room with counsel. And he did take advantage of my encouragement in that matter. Now after, in reiteration, after explaining to Mr. Kaczkowski what he had been personally accused of by his accuser, Mr. Kaczkowski then had privileged conversation with his counsel, Mr. Ceci and Mr. Frischler, and then returned to the interview room. We then, Mr. Kaczkowski, upon advice of counsel, made certain statements or disclosures to me."

* * * *

APPENDIX B

Excerpt from transcript of testimony in Hearing on Appeal of Dismissal before the Board of Fire and Police Commissioners relative to Joseph E. Niedziejko as follows:

Direct Examination of Joseph C. Wilimovsky, Jr.

Page of Transcript

160 "Q. Pursuant to that request, did you give this examination to Joseph E. Niedziejko?

"A. On Tuesday, the 25th of June of this year.

"Q. Now, would you state the circumstances under which this examination was given.

"A. Mr. Niedziejko made himself available—as a matter of fact, I think he was accompanied by Lieutenant Ritzman, representing Chief of Police Johnson. They arrived at Madison at approximately 10:30 a.m. Mr. Frischler, Attorney Frischler and Attorney Ceci, representing Mr. Niedziejko, also were present. Mr. Frischler and Mr. Ceci were briefed by me relative to the representations and allegations of the accuser, Johnnie Mae Jackson, in reference to Mr. Niedziejko.

"Q. Now, during that briefing, were any questions asked of Mr. Niedziejko relative to gifts?

"A. Well, after I had briefed Mr. Ceci and Mr. Frischler, both of the gentlemen had private or privileged communication with their client, Mr. Niedziejko. Mr. Niedziejko then was formally introduced to me, where I formally and officially advised him of what he was accused of by Johnnie Mae Jackson."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 362

STATE OF WISCONSIN EX REL.
JOSEPH E. NIEDZIEJKO
and ALFRED KACZKOWSKI,
Petitioners,

v.

BOARD OF FIRE AND POLICE
COMMISSIONERS OF THE CITY
OF MILWAUKEE,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

DOMINIC H. FRINZI
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorney for Petitioners

Of Counsel:
Louis J. Ceci
Nicholas C. Catania

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that this Court grant rehearing of its order of October 9, 1967, denying the petition for writ of certiorari, ____ U.S. ____, and that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin in the above-entitled case as prayed for in

the petition filed July 13, 1967, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The petition for certiorari previously filed herein presented the questions:

A. Were petitioners, police officers, denied their rights under the Fifth and Fourteenth Amendments of the United States Constitution, when they are compelled to answer inquiries as to their alleged misconduct, under pain of immediate discharge?

B. Where petitioners, police officers, are compelled to answer inquiries as to their alleged misconduct, under threat of immediate discharge, can such coerced statements be used as evidence to discharge petitioners?

The petition for certiorari discussed the importance of the question presented by the failure of the Wisconsin Supreme Court to apply the rationale of Spevack v. Klein, (1967) 385 U.S. 511, 87 Sup. Ct. 625, 17 L. Ed. 2d 574, and more importantly the rationale presented by Garrity v. New Jersey, (1967) 385 U.S. 493, 87 Sup. Ct. 616, 17 L. Ed. 2d 562. At the time, while strongly suggesting that the safeguards afforded to criminals should also apply to civil matters, the petition for certiorari acknowledged that this Court had not decided "Whether a policeman, who

invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach." Spevack Case, supra, footnote 3. The petition for certiorari urged that the rationale of the Garrity Case, supra, should apply with equal force in a civil matter.

Petitioners now respectfully present other substantial grounds available to petitioners although not previously presented.

CAN PETITIONERS BE DENIED THE EQUAL PROTECTION OF THE LAWS GUARANTEED TO ALL PERSONS, WHEN THE BASIS FOR SUCH DISCRIMINATION AND INEQUALITY OF TREATMENT RESTS SOLELY UPON THEIR OCCUPATION AS POLICE OFFICERS?

When an inquiry is made into the official conduct of a public officer, whether that inquiry be by the state or any municipality, such public officer must cooperate. However, mindful of the privileges afforded to all persons by the United States Constitution, the State of Wisconsin enacted an immunity statute (Section 885.24) which provides, among other things, as follows: ..."But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such action, proceeding or examination, except a prosecution

for perjury committed in giving such testimony." Emphasis added.

The statute in question appears in full in the petition for certiorari heretofore filed. (Appendix A, p. 1a). That petitioners herein did assert their claim to immunity under this state statute is evidenced in the opinion of the Wisconsin Supreme Court (Appendix B, p. 2a) where that lower court said ..."both petitioners refused to testify upon the ground of self-incrimination." (Appendix B, at p. 23a).

Petitioners concede that, in view of the language contained in the Wisconsin Statute, the privilege against self-incrimination must be invoked before immunity applies. Wolke v. Fleming (1964) 129 N.W. 2d 841, 24 Wis. 2d 606, certiorari denied 85 Sup. Ct. 897, 380 U.S. 912, 13 L. Ed. 2d 798. The decision of United States v. Monia (1943), 317 U.S. 424, 63 Sup. Ct. 409, 87 L. Ed. 376, construing a somewhat similar federal statute as providing automatic immunity does establish a federal standard applicable here where petitioners claimed their privilege against self-incrimination.

To deny to petitioners the immunity expressly granted by operation of Sec. 885.24, Wisconsin Stats.) solely on the grounds that petitioners were police officers does violence not only to the standards enunciated in the Monia case, supra, but also to the basic constitutional concept that all persons shall

be afforded the equal protection of the laws.

Since there is now presented to the Court other substantial grounds available to petitioners although not previously presented which raise an important question of federal law, it is appropriate that the question be reviewed by this Court.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

DOMINIC H. FRINZI